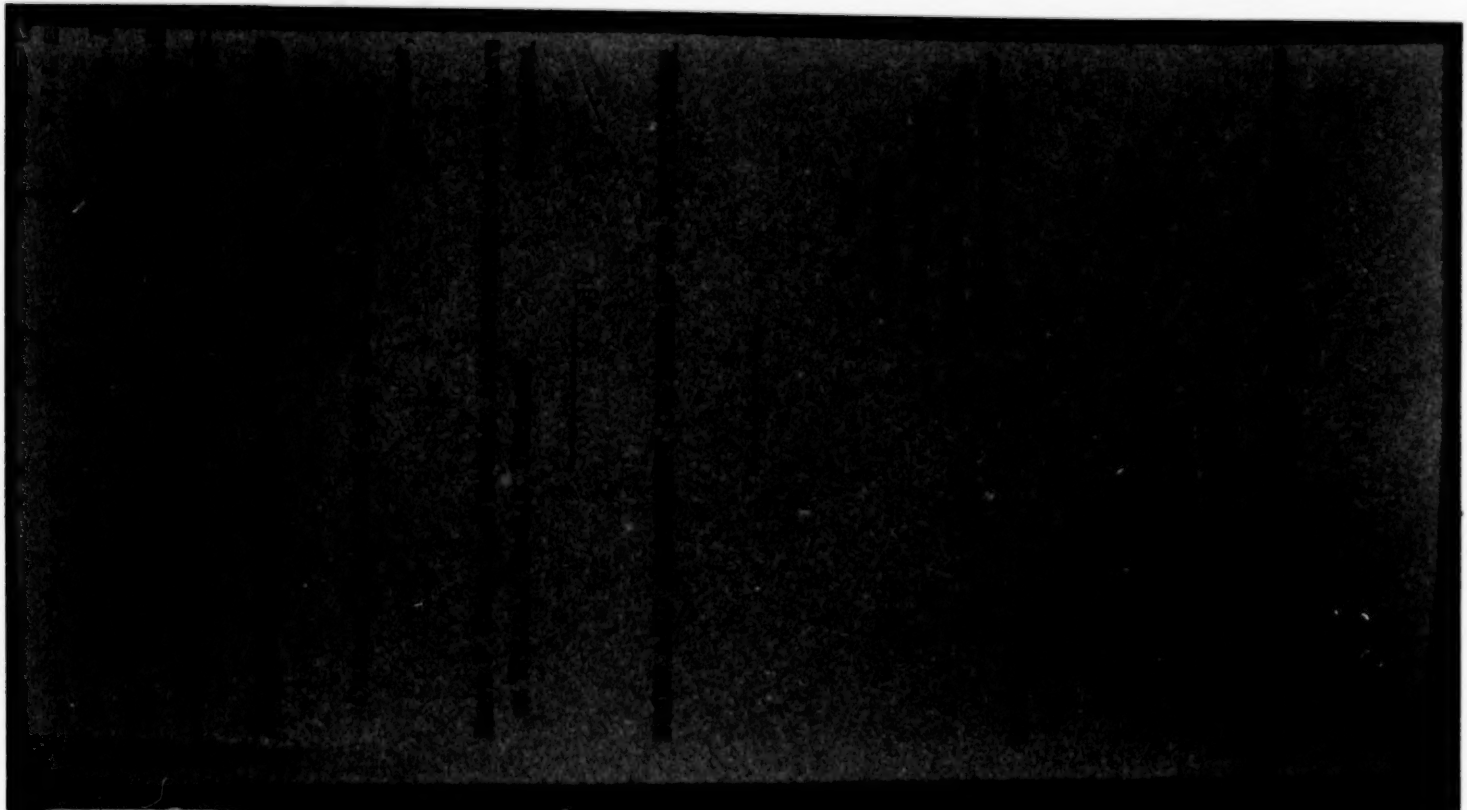

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Supreme Court of the United States

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

(Opinion of the Supreme Court of Minnesota is reported in 200 Northwestern Reporter 477.)

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED.

May it please the Court:

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Minnesota entered, docketed and filed on November 13, 1924, in favor of the plaintiff and against the defendant in the sum of $14,363.29 (R. 108 and 109).

William Coogan, one of defendant's brakemen, was run-over and killed at Farmington, Minnesota. Edith Coogan, as administratrix of Coogan's estate, claims she is entitled to recover damages for the death of Coogan under rights and liabilities created by the so-called Federal Employer's

Liability Act, Employer's Liability Act of 1908, Chapter 149, 35 Stat. 65, as amended April 5, 1910, Chapter 143, 36 Stat. 291.

Plaintiff predicated her cause of action solely on the Federal Employer's Liability Act, namely, Coogan's foot, while he was engaged in and about an interstate train, was caught under and held by a defective air pipe and while so held he was run over and killed (R. 2, 3 and 8).

At the close of the testimony defendant duly and properly in accordance with the practice of the State Court, moved the Court to direct a verdict in its favor on the ground that no actionable negligence had been shown and a verdict in this case in favor of plaintiff would necessarily be based upon speculation and conjecture and on the ground that Coogan assumed the risk (R. 93). The motion was denied (R. 93) and a verdict rendered for plaintiff (R. 97).

Defendant, in accordance with the practice of the State Court, duly moved the Court for judgment notwithstanding the verdict (R. 98 and 99). The motion was denied (R. 99). Judgment was entered in favor of the plaintiff in the District Court of Dakota County on March 10, 1924 (R. 100 and 101).

Defendant duly appealed from the judgment to the Supreme Court of Minnesota, the highest Court of the State, and set out as error the ruling of the trial court in denying aforesaid motions and in permitting plaintiff to recover upon rights asserted under the Federal Employer's Liability Act, *supra* (R. 101 to 103, incl.). The Supreme Court of Minnesota affirmed the orders of the trial court, denying defendant's motion for judgment notwithstanding the verdict and the order of the trial court entering judgment for the plaintiff. The Supreme Court of Minnesota held there was

substantial evidence which justified the jury in finding that defendant was liable under the Federal Employer's Liability Act because of the alleged defective air pipe line and further held that Coogan did not, as a matter of law under the Federal Employer's Liability Act, assume the risk of injury to himself on account of the condition of the air pipe line (R. 104).

This action, therefore, is brought to establish a liability depending solely on Acts of Congress.

Employer's Liability Acts, supra.

Mondou v. N. Y. N. H. & H. R. Co., 223 U. S. 1, 32 Sup. Ct. Rep. 169.

Seaboard Air Line Railway Company v. Horton, 233 U. S. 492, 34 Sup. Ct. Rep. 635.

It involves rights that exist exclusively under Federal Statutes and it therefore presents federal questions properly determinable by this Court and the following cases sustain the jurisdiction of this Court.

St. Louis Iron Mountain & Southern Ry. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct. Rep. 858.

New Orleans & N. E. Ry. Co., et al. v. Harris, 247 U. S. 367, 38 Sup. Ct. Rep. 535.

Southern Railway Company v. Gray, Admx., 241 U. S. 333, 36 Sup. Ct. Rep. 558.

N. Y. Central Railway Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. Rep. 546.

Yazoo & M. V. Railway Company, et al. v. Mullins, 249 U. S. 531, 39 Sup. Ct. Rep. 368.

STATEMENT OF THE CASE.

This action was instituted in the District Court of Dakota County, Minnesota, by the respondent, Edith F. Coogan, as special administratrix of the estate of William Coogan, deceased, to recover damages for the death of William Coogan, who received fatal injuries while employed by petitioner as a brakeman at Farmington, Minnesota.

On July 14, 1923, about 7:00 A. M., petitioner's freight train No. 92, operating from Farmington to Austin, Minnesota, was being made up by a switching crew on track No. 1, of petitioner's yard at Farmington, Minnesota (R. 12, 13 and 64). Coogan, the deceased, was rear brakeman of the road crew which was to have charge of the train after it had been made up and when it had started on its journey to Austin. Coogan was killed at about 7:00 A. M. and before the train had been turned over to the road crew. There was no eye witness to the accident and no one knew in what manner he met his death or what he was then doing.

It is conceded by both parties that the train contained interstate cars and that the rights and liabilities of the parties are governed by the Federal Employer's Liability Act.

The tracks in the Farmington yard run east and west. The most northerly track is known as the main line track. South of and parallel to this track there are a large number of yard tracks numbered consecutively 1, 2, 3, etc. (R. 33 and 63). In making up train No. 92 cars were picked up from the various tracks, pulled onto a so-called lead track at the west end of the yard and kicked down to the east on track No. 1. An iron pipe line one and three-fourths inches in diameter (R. 78) called an air pipe line, extended parallel to and about one foot south of the south rail of track No. 1

(R. 39 and 78). It was fastened at various points to the top of ties by iron clamps or track spikes (R. 66).

On the morning in question the first car kicked east on track No. 1 was the caboose (R. 13, 22 and 33). The decedent rode the caboose on this movement (R. 13 and 33). Thereafter three cuts of cars were kicked onto track No. 1 from the west end and were coupled onto the caboose by impact (R. 22, 23, 33 and 34).

Dubke, a member of the switching crew, rode the head car of each one of these cuts and controlled their movements by the hand brakes (R. 22, 23, 33 and 34). When the first cut of cars was coupled onto the caboose Dubke conversed with Coogan, who was then standing on the ground beside the caboose (R. 25). This was the last time anyone saw Coogan previous to the finding of his dead body (R. 25). After the three cuts of cars had been kicked in on track No. 1, the engine shoved all of the cars one and one-half or two car lengths (R. 34). It was the duty of head brakeman Delhanty, of the road crew, to couple up the air on the train (R. 24). After the road engine had been coupled onto the train, Dubke, for the purpose of accommodating Delhanty, started back along the south side of the train and coupled up the air at several different places (R. 23 and 24). While walking back along the train he discovered Coogan's body lying between tracks No. 1 and No. 2 (R. 23). The body was lying on its back (R. 17) with the head towards the west (R. 18) parallel to track No. 1 and wholly outside the south end of the ties (R. 10 and 17). The body was located about a car length and a half west of the caboose (R. 10 and 18). Certain marks on the ground showed that the body had been dragged eight or ten feet (R. 10, 11 and 18). These marks or scuffing on the ground were located

outside of the south rail and extended from the rail out to where the body was found (R. 10). Blood was found on the southeast wheel of the car coupled to the caboose (R. 11 and 18). The air was not coupled between the caboose and this car. The decedent's hat and other articles were found between the rails under or near the draw bar between the second and third cars ahead of the caboose (R. 20, 26 and 27). Apparently the wheels had run over decedent's left leg and left arm (R. 27). West of the body the air pipe line bulged up from the ties about three inches and bulged in toward the rail from three to six inches (R. 40, 41, 68, 69, 87 and 88). The bulge in the pipe was about 12 or 15 feet long (R. 41 and 69). The east end of the bulge was 15 feet west of the hat and other articles mentioned (R. 86) and was from 20 to 50 feet west of the body (R. 40, 47, 64, 67 and 86).

A witness for the plaintiff testified that a man in coupling up air faces towards the engine (R. 41). Defendant's witnesses showed that an experienced train man, in going in between cars to couple up the air, invariably has his left foot inside the rail (R. 88, 90 and 91) and ordinarily has his right foot outside the rail (R. 79, 80, 81, 88, 90 and 91). He faces the angle cock (R. 81). Having in mind the train involved in this case a man stepping in between the cars from the left or south side would face towards the caboose or rear end of the train (R. 64, 65 and 89). An experienced man would face towards the caboose or rear end of the train when coupling up the air from the left side. However, entering from the north or right side he would face towards the head end of the train (R. 65 and 89). This is brought about by the fact that a man facing the end of any car finds the draw bar and car coupler are located at the center of the

end of the car and the air hose is to the right of the coupler and draw bar (R. 90 and 91).

The plaintiff introduced in evidence decedent's shoes and called attention to the fact that the outside of the counter of the left shoe was scratched and slightly dented in. The plaintiff did not show that this condition existed immediately after the accident or that it did not exist prior to the accident. The undertaker, who was one of plaintiff's witnesses and the only one who testified as to the condition of the shoe in this respect, stated that he noticed the dent and scratch in the shoe quite a while after the accident and that it was first called to his attention by plaintiff's counsel (R. 27 and 29). He had no personal recollection of the condition of the shoe when it was taken from decedent's body (R. 29 and 30). H. J. Goodwin, one of plaintiff's counsel, testified that he first saw the shoe a week or ten days after the accident (R. 53). The undertaker said it was quite a while after the body was shipped to Austin for the funeral (R. 27). The shoe had been kept in the undertaker's garage and no attention was paid to it (R. 27 to 30, incl.). There is no proof to show that the shoe was not scratched and dented during the time it was in the garage.

Coogan had worked for the defendant for fourteen years prior to the accident (R. 55). Practically every terminal yard on the line of railroad of the defendant, as well as on the line of railway of other railway companies, contains an air pipe line similar to the one involved in the instant case and such air pipe line ordinarily is placed outside the rails and on the top of the ties (R. 77 and 78). The air pipe line in question was built three or four years prior to Coogan's death (R. 61, 62 and 78). He had been working on trains in and out of the Farmington yards since 1908, the year in

which the yard was built (R. 62). The plaintiff testified that decedent, her husband, had been working on trains No. 91 and 92 in and out of Farmington practically all the time for a period of from three to four months prior to his death (R. 56 and 62).

Train No. 91 ordinarily arrived at Farmington at about 3:00 P. M. (R. 63) and train No. 92 was due to leave the same yard at 7:00 A. M. (R. 64). For several months, therefore, previous to July 14th, the date of the accident, when the train arrived at and left the Farmington yard, it would be daylight. Train No. 92 was ordinarily made up on track No. 1, on the main line track, track No. 2 or No. 3. From each of these tracks the air pipe line could be easily seen (R. 64 and 75).

The air pipe line had been in substantially the same condition for five or six months before the accident (R. 65).

At the close of all the testimony in the case, defendant made a motion for a directed verdict in its favor on the ground that plaintiff had failed to prove any actionable negligence against the defendant, on the ground that any verdict in favor of the plaintiff would, of necessity, be based wholly upon speculation and conjecture and on the further ground that the evidence conclusively showed that Mr. Coogan, the deceased, assumed the risk caused by the presence and condition of the air pipe line in question (R. 93).

The motion was denied and the jury brought in a verdict for the plaintiff (R. 93 and 97).

The defendant made a motion for judgment notwithstanding the verdict and this motion was denied (R. 99).

Judgment was entered in the District Court of Dakota County in favor of the plaintiff on March 10, 1924 (R. 99 to 101, incl.).

The defendant appealed to the Supreme Court of Minnesota from such judgment and the judgment was affirmed by said Supreme Court on October 31, 1924 (R. 104 and 105) (200 N. W. Rep. 477).

Final judgment was entered in the Supreme Court of the state of Minnesota on November 13th, 1924, in the sum of fourteen thousand three hundred sixty-three and 29/100 ($14,363.29) dollars (R. 108 and 109).

A petition for a writ of certiorari was granted by this Court on March 16, 1925.

The Questions Involved.

The plaintiff's theory of the case is that decedent stepped in between the caboose and the car attached to it from the south side of track No. 1, for the purpose of coupling up the air hose between those cars; that he faced towards the engine and had his right foot inside the south rail and his left foot outside the rail; that in making up the train the cars were backed to the east and decedent, in attempting to get out from between the cars caught his left foot under the air pipe line at the point where it was bulged and his foot became fastened; that as a consequence he was caught by the rigging on a moving car, thrown under the wheels and killed. The plaintiff's cause of action is predicated solely on the Federal Employer's Liability Act. The only claim of negligence is that the air pipe line was defective and that such defective condition was the proximate cause of decedent's death.

The first question, therefore, is whether or not the evidence under the Federal Employer's Liability Act is sufficient to sustain a finding that the alleged defective air pipe line proximately contributed to the death of Coogan.

The second question is, whether or not the decedent, under

the Federal Employer's Liability Act assumed the risk of dangers incident to his working at or about the alleged defective air pipe line.

Said questions are raised by motion for directed verdict made at the close of the testimony (R. 93), by motion for judgment notwithstanding the verdict (R. 98 and 99) and by assignments of error in the appeal to the Supreme Court of Minnesota (R. 101 and 102).

Specifications of Error Relied Upon.

I.

The Supreme Court of Minnesota erred in permitting a recovery herein upon rights asserted under the Federal Employer's Liability Act, April 22nd, 1908, Chapter 149, 35 Stat. 65, as amended April 5, 1910, Chapter 143, 36 Stat. 291.

II.

The Supreme Court of Minnesota erred in submitting to the jury the question whether or not under the Federal Employer's Liability Act the defective air pipe line proximately contributed to William Coogan's death for the reason that no evidence in the case will support such a finding or conclusion.

III.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict and in permitting the jury, under the Federal Employer's Liability Act to return a verdict in favor of the plaintiff on account of the death of William Coogan for the reason that the cause of William Coogan's death was speculative and conjectural.

IV.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict and in permitting the jury to pass upon the question as to whether or not decedent assumed the risk of the defective air pipe line for the reason that William Coogan, as a matter of law, assumed the risk of such defective condition under the Federal Employer's Liability Act.

V.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict upon the ground that plaintiff failed to prove a cause of action or right of recovery in her favor under the Federal Employer's Liability Act or under any other federal act.

VI.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict in her favor for the reason that under the Federal Employer's Liability Act William Coogan assumed all risks to himself caused by the alleged improper construction and careless and negligent maintenance of the air pipe line.

VII.

The Supreme Court of Minnesota erred in denying defendant's motion for a directed verdict made at the close of all the testimony on the ground that under all the evidence in the case William Coogan's death is speculative and conjectural.

VIII.

The Supreme Court of Minnesota erred in denying defendant's motion for judgment notwithstanding the verdict upon the ground that plaintiff failed to prove that the alleged defective air pipe line proximately contributed to William Coogan's death.

IX.

The Supreme Court erred in denying defendant's motion for judgment notwithstanding the verdict on the ground that under the Federal Employer's Liability Act William Coogan assumed the risks to himself caused by the alleged negligent construction and maintenance of the air pipe line.

BRIEF OF THE ARGUMENT.

On July 14, 1923, at about 7:00 A. M., defendant's freight train No. 92 was being made up by a switching crew on track No. 1 at defendant's yard at Farmington, Minnesota. Coogan was rear brakeman of the road crew which was to have charge of the train after it was made up and ready to start on the trip to Austin. The train contained cars billed to points outside the State of Minnesota. He was killed before the train had been turned over to the road crew. There was no eye witness to the accident. Plaintiff predicates her cause of action on the Federal Employer's Liability Act. The sole act of negligence alleged is that defendant was negligent in the maintenance of a so-called air pipe line in that the pipe which normally lay on top of the ties, one foot outside the rails, on the south side, at the time in question bulged up from the ties about three inches and was also bent in towards the rail several inches.

Plaintiff claims Coogan was in the act of coupling up the air between the caboose and the car attached to it; that he was facing the engine with his left foot outside the rail between the air pipe line and the rail and had his right foot between the rails; that the cars were moved back towards the west and in getting out from between the cars his left foot was caught and fastened under the air pipe line at the point where it was bulged and plaintiff's clothing was caught by the rigging on the car and he was thrown under the wheels and killed. All movements of the cars were from the east to the west. Plaintiff introduced no evidence indicating that Coogan was nearer than a point fifteen feet west of the east end of the bulge in the pipe line. She introduced in evidence Coogan's left shoe. This shoe had a dent or scratch on the outside counter and she took the position that this proved that the left foot had been caught under the air pipe line in question. Plaintiff claims the alleged defective air pipe line was the proximate cause of Coogan's death and that she is entitled to recover under the Federal Employer's Liability Act on account of the aforesaid negligence.

Defendant contends that the plaintiff failed to prove a cause of action under the Federal Employer's Liability Act as the cause of Coogan's death is speculative and conjectural and the evidence in the case not only does not support plaintiff's theory of the case but in fact is inconsistent therewith. Defendant also contends that decedent must have known of the condition of the air pipe line and as a matter of law, under the Federal Employer's Liability Act, assumed the risk incident to working at and about such air pipe line in its then existing condition.

The merit of Specifications of Error Nos. I, II, III, V,

VII and VIII all depend upon the answer to the question as to whether or not plaintiff's right of recovery is based upon speculation and conjecture as claimed by defendant, or is based upon competent and substantial evidence which the jury could properly find proved that the alleged defective air pipe line proximately contributed to Coogan's death so as to permit a recovery under the so-called Federal Employer's Liability Act as claimed by plaintiff.

The merit of Specifications of Error Nos. IV, VI and IX deal with and depend upon a decision of the question as to whether or not Coogan assumed the risk caused by the condition of the air pipe line. Under these circumstances it would seem unnecessary and improper to take up the time of the Court to discuss each of the individual specifications of error as the ultimate error to which they respectively relate are covered under the two general subdivisions hereinafter discussed.

Plaintiff Failed to Prove That the Alleged Defective Air Pipe Line Proximately Contributed to Decedent's Death so as to Permit a Recovery Under the Federal Employer's Liability Act.

Plaintiff has evolved a theory as to how the accident occurred. Such theory is based upon a series of presumptions and not upon facts proven in this case.

The plaintiff has an accident causing death and a theory as to the way in which the accident occurred but such theory is unsupported by the testimony.

In *Perkins v. Northern Pacific Ry. Co.*, 193 Fed. 219, at page 225, the Court points out that this is not a sufficient basis on which to create a liability.

The leading case on this matter is *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 45 L. Ed. 261, 21 Sup. Ct. Rep. 275. We, therefore, take the liberty of quoting rather extensively from that decision. On page 663 of the opinion, the Court said:

> "Upon these facts we make these observations: First, that while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *New Jersey R. Transp. Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, 443, 35 L. Ed. 458, 463, 11 Sup. Ct. Rep. 859), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second, that in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there

is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this connection we wish to call the Court's special attention to a recent well reasoned decision of the Circuit Court of Appeals, Third Circuit, to-wit: *Reading Co. v. Boyer*, 6 Fed. (2d), 185.

See also:

Pittsburgh Coal Co. v. Myers, 203 Fed. 221.
Smith v. Illinois Cent. R. Co., 200 Fed. 553.
Truax v. M., St. P. & S. S. M. Ry. Co., 89 Minn. 143.
Bruckman v. C., St. P., M. & O. Ry. Co., 110 Minn. 309.
Perkins v G. N. Ry. Co., 152 Minn. 226.

In *United States v. Ross*, 92 U. S. 707, 23 Sup. Ct. 281, it is stated on page 283:

"No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proven, and not themselves presumed."

The Court on page 284, states as follows:

"A presumption which the jury is to make is not a circumstance in proof; it is not, therefore, a legitimate foundation for a presumption."

In the case of *Marian J. Looney, Admx., etc., v. Metropolitan Railroad Company*, 200 U. S. 480, 26 Sup. Ct. 303,

the United States Supreme Court on page 488 lays down the following rule with reference to a presumption of negligence on the part of the employer in a case in which an employee is killed:

> "But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

See also:

Freese v. C., B. & Q. Ry. Co., 263 U. S. 1, 44 Sup. Ct. Rep. 1.

The plaintiff claims decedent stepped in between the caboose and the car attached to it, to couple up the air.

After the accident the air was not coupled between these cars and there was blood on the southeast wheel of the car ahead of the caboose (R. 11 and 18).

Decedent may or may not have stepped in between the caboose and the car next to it. He may have started to get onto the west end of the caboose just at the time when cars were kicked into the caboose and on account of the impact been knocked off and fallen on the track between the caboose and the car next to it.

He may have started to go in between the cars and tripped on the rail, on the end of the tie or on the air pipe line at a point where it was not bulged. He may have been in between the cars and stumbled over the rail in getting out. He may have been between the cars and when he heard them backing up, have grabbed for a hand hold, missed it and fallen. He may have been on top of the cars to release the

brakes and fallen between the caboose and the car next to it. No one saw the plaintiff step in between the cars and it is a presumption only that he did so.

It was the duty of the head brakeman of the road crew to couple up the air (R. 24) and not decedent's duty and therefore, it seems that a presumption that he stepped in between the cars to couple up the air would be unsupported by the evidence in this case.

It is plaintiff's theory that decedent had his right foot inside the rail and his left foot outside the rail. Decedent's left leg and left arm were crushed and apparently run over (R. 27). Under these circumstances the natural inference is that the left foot was inside the rail and the right foot outside. If the left foot was inside the rail it was not caught under the air pipe line outside the rail. Here again a presumption is indulged in without support in the evidence and in this instance the presumption is not consistent with the evidence in the case.

It is plaintiff's theory that decedent's left foot was caught and fastened under the air pipe line at the point where the pipe was bulged. The only evidence introduced by plaintiff in support of her theory was decedent's left shoe which contained a slight indentation and scratch on the outside counter. No one noticed this condition of the shoe until a considerable time after the accident and the funeral (R. 27 and 29). Before the dent and scratch was noticed on the shoe the decedent's shoes had been in the undertaker's garage for some time and no particular attention had been given to them (R. 27 to 30, incl.). Here, of course, the plaintiff indulges in the presumption that the shoe had no dent or scratch on it before the accident and that the shoe was scratched and dented in the accident. There is no proof to

show what the condition of the shoe was before the accident, what the condition of the shoe was immediately after the accident or what its condition was at the time it was taken off the body by the undertaker (R. 27 to 30, incl.). If the left shoe had been fastened under the air pipe line the shoe would naturally be scratched on both the inside and outside of the foot. If the decedent's left leg was run over it is only natural to expect that the shoe would be dragged on the ground, or hit a rock, a tie, a bolt or a part of the car and as a consequence become dented and scratched. Surely a dent and scratch on one side of the shoe would not prove that the shoe was fastened under the air pipe line. There was absolutely no proof of any scuffing or other marks on the ties or the ground under the air pipe line or any evidence to indicate that anything had been caught under the air pipe line. The iron pipe was old and, of course, rusty, but no proof was introduced indicating that the rust was scraped off at any place. There was no proof of any marks on or under the pipe at any place. The proof was undisputed that the pipe had been in substantially the same condition for five or six months before the accident (R. 65) and plaintiff has not and cannot, claim that the pipe was bulged on account of the accident. The body was from 20 to 50 feet east of the east end of the bulge in the pipe (R. 40, 47, 64, 67 and 86). Decedent's hat and other articles were found 15 or more feet east of the east end of the bulge in the pipe (R. 86). The scuffing and marks on the ground from the body were found extending from the body to a point eight to ten feet west thereof (R. 10, 11 and 18). The scuffing, therefore, was east of the hat and other articles mentioned. There is, therefore, no proof to indicate that decedent was at any time nearer than 15 feet of the bulge in the air pipe

line. There is no evidence in the case which supports a presumption that the decedent's left foot was fastened under the air pipe line at the point where the pipe was bulged.

As stated in the Patton case, *supra*, it is not sufficient for the plaintiff to show that the defendant may have been guilty of negligence but the evidence must point to the fact that defendant was. As stated in the Looney case, *supra*, a right of recovery cannot be based upon a series of presumptions.

Without any support in the evidence the plaintiff indulges in the following presumptions:

1. That decedent stepped in between the caboose and car attached to it to couple up the air hose.

2. That decedent had his right foot between the rails and his left foot between the south rail and the air pipe line.

3. That the cars were moved before decedent had a chance to couple up the air hose.

4. That decedent endeavored to get out from between the cars.

5. That decedent at that time was at the place where the air pipe was bulged.

6. That decedent's left foot became fastened under the round air pipe line.

7. That the shoe was not dented or scratched before the accident.

8. That the left shoe was scratched and indented immediately after the accident.

9. That the left shoe did not become scratched or indented while on the floor of the undertaker's garage.

10. That the dent and scratch on the left shoe was caused by the foot being caught under the air pipe line.

11. That on account of decedent's left foot being caught under the air pipe line he was caught by the rigging of the car and was thrown under the wheels and killed.

In the present case the plaintiff introduced evidence as to the condition of the air pipe line and the sole negligence complained of was the condition of same. In *Perkins v. Northern Pacific Railway Company, supra*, at page 223, the Circuit Court, Eastern Division of Washington, states:

> "In cases of this character it is incumbent upon the plaintiff to show not only negligence on the part of the master but causal connection between that negligence and the injury complained of."

The plaintiff here has wholly failed to show any causal connection between the alleged defective air pipe line and the death of her husband.

In *Smith v. Illinois Central Railway Company, et al., supra,* the Circuit Court of Appeals of the Sixth Circuit, stated as follows:

> "It is not enough for plaintiff to show that defendant may have been guilty of negligence. The evidence must point to the fact that it was so negligent. And where the testimony leaves the question unanswered, and shows that any one of several things may have induced the accident. For one or more of which the defendant is responsible, and for others of which he is not, it is not permissible to speculate between the several causes and to find that the negligence of defendant was the real cause, in the absence of satisfactory foundation in the testimony for that conclusion."

In various cases the rule has been stated that cases should not be submitted to the jury for submission simply on a question of probability. In *Day v. Boston & Maine Railroad Co.*, 96 Me. 207, 52 Atlantic Reporter 771, at page 217, Judge Emery stated:

> "Quantitative probability is only the greater chance. It is not proof, nor even probative evidence of the proposition to be proven. That in one throw of dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise. * * * However confidently one in his own affairs may base his judgment on more probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances."

See also:

Virginia & S. W. Ry. Co. v. Hawk, 160 Federal 348.

There, of course, is a possibility that Coogan was killed in the manner in which plaintiff claims but the evidence not only does not support plaintiff's theory but is so inconsistent with the known facts as to make it highly improbable.

The difficulty with plaintiff's theory in this case is that she has failed to prove facts from which the ultimate inferences which she wishes to establish can be drawn. She has merely suggested a series of presumptions many of which are not even consistent with facts proven in the case.

Plaintiff's entire case is based on an alleged defective air pipe line under which she claims Coogan's foot became fastened. Plaintiff has no evidence to show that Coogan's left foot ever became fastened under the air pipe line at the point where the air pipe line was bulged or at any other point and she has no evidence to show that at any time he was any nearer than 15 feet from the nearest end of the bulge in the pipe.

It is respectfully suggested that plaintiff has failed to prove that the alleged defective air pipe line proximately contributed to Coogan's death.

DECEDENT ASSUMED THE RISK CAUSED BY THE CONDITION OF THE AIR PIPE LINE AND CANNOT RECOVER IN THIS CASE.

The evidence is undisputed that Coogan worked on trains running into and from the Farmington yards for a period of three or four months next preceding the accident (R. 56 and 62) and during that time his train left and arrived during daylight and he had considerable occasion to be on and near track No. 1 (R. 63, 64 and 75). He had a great many opportunities to observe the condition of the air pipe line (R. 64 and 75). He had had considerable experience on trains running in and out of the Farmington yards prior to the period just above mentioned (R. 62). The air pipe line had been in substantially the same condition for a period of at least five or six months before the accident (R. 65) and he is, of course, presumed to have known of its location and condition.

If he went in between the caboose and car next to the caboose as plaintiff claims he went in with a knowledge of the condition of the air pipe line in question, he, of course,

fully appreciated the dangers and risk of his working between the cars in the vicinity of the air pipe line and he must have appreciated the dangers to be reasonably anticipated in working at and about such air pipe line at the point where it was bulged.

Special attention is called to the case of *Southern Pacific Co. v. Berkshire*, 254 U. S. 415, 41 Sup. Ct. Rep. 162. In the Berkshire case the United States Supreme Court holds that an engineer who has passed over a particular route many times must be presumed to know of the existence of a mail crane when such mail crane was visible from the engineer's seat. This case we consider of special importance on this feature of the case and we therefore take the liberty of quoting rather extensively from it. On page 416, the Court said:

> "The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers."

On page 416, the Court stated as follows:

> "Linder has been upon this route for some years, has passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat, half a mile ahead through a front window. About

a mile before reaching Carney, Linder had notice that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indicate that he was more than fourteen inches out from the engine's side."

On page 118, the Court further said:

"It is going very far to leave it open to a jury to attach liability in tort to a system by which the end of the arms of postal cranes come to fourteen inches from the car.

But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

See also:

Tuttle, Admr. v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. Rep. 1166, 30 L. Ed. 1154.

Little Rock & M. R. Co. v. Wanley, 56 Fed. 1000.

The air pipe line in question constituted a part of the equipment of the Farmington yard (R. 78). If Linder in the Berkshire case was presumed to have known of the mail crane and to have known the danger to be expected therefrom, it seems clear that Coogan must be presumed to have known of the air pipe line and its condition and to have known the dangers to be expected therefrom by a brakeman coupling up the air from the south side of the train on track No. 1 while cars were being kicked into and shoved against said train. He, of course, knew that he might be required to get out from between the cars very rapidly and that any obstruction might be fatal. Of course, it should be kept in mind that it was the duty of the head brakeman to couple up the air and not the duty of decedent (R. 24).

We submit that the reasoning of the United States Supreme Court in the Berkshire case is applicable and controlling in the present case on the question of assumption of risk and that it appears as a matter of law that Coogan assumed the risk of the method of construction and condition of the air pipe line in question and that such assumption of risk under the Federal Employer's Liability Act prevents a recovery on behalf of the plaintiff in this case.

It is, of course, regrettable that no one knows the manner in which Coogan met his death and it is indeed unfortunate that the plaintiff is not in a position to show the manner in which her husband met his death in order that the Court may be in a position to decide whether or not the defendant company was or was not responsible for such death.

However, as indicated in the Patton and other cases mentioned above, juries should not be permitted to substitute sympathy for evidence in arriving at verdicts.

The manner in which Coogan met his death and the proximate cause thereof is purely speculative and conjectural and the plaintiff has failed to prove a right of recovery as against this defendant under the Federal Employer's Liability Act.

We submit that the plaintiff has failed to prove a cause of action under the Federal Employer's Liability Act and that the decision of the Supreme Court of the State of Minnesota is at variance with the holdings of this Court.

Respectfully submitted,

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Service of the foregoing brief and argument in behalf of petitioner is hereby admitted this 23d day of November, 1925.

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